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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 TASHIANA LUKE,

13 Plaintiff,

14 v.

15 DOUGH BOY, INC.; LANGSTON
16 FAIZON SANTISIMA a/k/a
17 FAIZON ANDRE LOVE,
18 Individually,

19 Defendants.
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CASE NO. 2:18-cv-07456-ODW-GJS

**PLAINTIFF'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, OR
IN THE ALTERNATIVE,
PARTIAL SUMMARY
JUDGMENT AGAINST
PLAINTIFF**

Date: December 16, 2019

Time: 1:30 PM

Ctrm: 5D (First Street Courthouse)

Judge: Hon. Otis D. Wright

Action Filed: 08/24/2018

Trial Date: 03/20/2020

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action arises out of Plaintiff Tashiana Luke's ("Plaintiff") former employment with defendant Assembly Robot, Inc. ("Assembly") (incorrectly sued as Dough Boy, Inc.) and Defendant Faizon Love ("Love") (incorrectly sued as Langston Faizon Santisima a/k/a Faizon Andre Love) as an assistant and writer working for Love and his company, Assembly.

Plaintiff brought four causes of action against Assembly and Love under the California Fair Employment & Housing Act (the "FEHA") for discrimination based on sex (Count I), hostile work environment harassment (Count II), retaliation for engaging in protected activity (Count IV), and failure to prevent discrimination and harassment (Count III).

Plaintiff does not oppose Defendants' motion for partial summary judgment as to her causes of action for discrimination, failure to prevent, and retaliation. However, Defendants' motion for partial summary judgment should be denied as to Plaintiff's cause of action for sexual harassment under Cal. Govt. Code §12940(j), because the harassment that Plaintiff suffered was sufficiently severe so as to fundamentally alter the terms and conditions of Plaintiff's employment.

II. STATEMENT OF FACTS

As noted in Defendants' Memorandum, Assembly Robot, Inc. ("Assembly") is a California corporation in the entertainment business. Defendants' UMF 1. Defendant Faizon Love ("Love") is an actor and comedian who is Assembly's sole shareholder and officer. Defendants' UMF 2-3. Plaintiff Tashiana Luke first met Defendant Love on the "Real Husbands of Hollywood" ("RHOH") television show. Defendants' UMF 8. During his time on RHOH, Love sent photos of his penis to co-workers on several occasions via text message. Plaintiff's Statement of

1 Material Facts (“SMF”) 72. Love felt that doing so was not inappropriate, and
2 thought it was “a joke” to do so. Plaintiff’s SMF 73, 74. After Love sent a photo
3 to a female assistant, he was told by a producer that it was “inappropriate” for him
4 to do so, which confused him. Plaintiff’s SMF 75, 76.

5 After the end of RHOH, Luke accepted employment with Love as his
6 personal assistant. Defendants’ UMF 14. Luke began working with Love around
7 June 9, 2016, performing duties including scheduling, making travel arrangements
8 for Love, and setting up guest appearances. Defendants’ UMF 18. During this
9 time, Love and Luke discussed Luke assisting Love as a writer and assisting with
10 casting for a parody that Defendant Love wanted to create of a pornographic film.
11 Defendants’ UMF 19. Luke accepted, thinking that the idea would be “funny.”
12 Defendants’ UMF 24. Luke understood that the parody would be of a
13 pornographic film, but that would it would include any actual nudity or sexual
14 intercourse. Plaintiff’s Statement of Material Facts (“SMF”) 59, 60. Luke
15 understood that the parody would include a dramatization of a pornographic film,
16 and would include “everything...you would have to shoot porn, but we would not
17 actually be shooting porn.” Plaintiff’s SMF 61.

18 During her employment with Love, Luke recalled several instances in which
19 Defendant Love sexually harassed her. At one point, Luke recalled that Love told
20 her “you know you need you tuition paid,” which Luke took to have a sexual
21 undertone. Defendants’ UMF 34, 36. On another occasion, Love ogled Luke
22 while graphically looking her up and down and making a noise with his mouth
23 when they met at Roscoe’s restaurant, also making a comment about her outfit.
24 Defendants’ UMF 37. On another occasion, Love stated to Luke that her “ass
25 looked good” in her jeans. Plaintiff’s SMF 70.

26 On June 25, 2016, Defendant Love sent a text message to Plaintiff with a
27 video clip of Love receiving oral sex, along with a text message stating “I shot a
28 test scene what do you think.” Defendants’ UMF 43. Luke was shocked and

1 disgusted upon receiving the text message. Plaintiff's SMF 67. Specifically, Luke
2 felt that it "[was] not a test scene [or] a parody. This is [Love] sending me a video
3 of him receiving oral sex in slow motion." Plaintiff's SMF 63. Luke understood
4 the scene to be "real porn," and not appropriate for a parody. Plaintiff's SMF 64.
5 At the time of the text message, Luke had discussed neither casting nor test scenes
6 with Love, which she understood to be her role prior to anything being shot.
7 Plaintiff's SMF 65, 66. Based on Love sending her the video of graphic oral sex
8 and his previous harassing behavior such as staring at her and commenting on her
9 figure, Luke felt violated and sexually harassed. Plaintiff's SMF 69-70.

10 Accordingly, Luke ended her employment with Love after receiving the text
11 message. Defendants' UMF 46. After doing so, Love sent Luke several
12 aggravated text messages, including "Blu!!!! [Luke's nickname]" followed by
13 "Pic [sic] up" and then "If you don't pic [sic] this phone up." Plaintiff's SMF 71.
14 After Luke informed Love of her knowledge of Love's prior incidents involving
15 sending pictures of his penis to others, Love even threatened Luke in a later text
16 exchange, stating "You better have a hella [sic] squad in philly [sic] because I got
17 one in the 60s lets go Brent I'm show [sic] this monkey bitch who the devil is."
18 Plaintiff's SMF 78, 79.

21 **III. SUMMARY JUDGMENT STANDARD**

22 As noted in Defendants' memorandum, summary judgment is appropriate
23 where there is "no genuine issue as to any material fact" and that "the moving
24 party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is
25 "material" if its existence or non-existence would affect outcome of the suit under
26 governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). An
27 issue of fact is "genuine" when there is sufficient evidence from which a
28 reasonable jury could find in favor of the non-moving party regarding the existence

1 of that fact. *Id.* The burden to show that there are no genuine issues of fact rests
 2 with the party seeking summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317,
 3 322 (1986). The moving party must identify relevant portions of the record that
 4 demonstrate the absence of a fact necessary for one or more essential elements of
 5 each cause of action upon which the moving party seeks judgment. *Id.* at 323.

6 Crucially, when considering a motion for summary judgment, all inferences
 7 drawn from the underlying facts “must be viewed in the light most favorable to the
 8 party opposing the motion.” *Matsuhisha Elec. Indus. Co. v. Zenith Radio Corp.*,
 9 475 U.S. 574, 587 (1986); *see also Anderson*, 477 U.S. at 248. “[T]he plaintiff, to
 10 survive the defendant’s motion [for summary judgment], need only present
 11 evidence from which a jury **might** return a verdict in his favor.” *T.W. Elec. Serv.,*
 12 *Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 631 (1987) (emphasis added)
 13 (citing *Anderson*, 477 U.S. at 256).

14 15 **IV. ARGUMENT**

16 **A. Plaintiff’s Cause of Action for Harassment against Defendants** 17 **should Proceed, because the Conduct Alleged Constitutes Severe Harassment**

18
 19 As Defendants note, to establish a *prima facie* case for hostile work
 20 environment harassment under the FEHA, a plaintiff must demonstrate that (1) she
 21 was subjected to unwelcome sexual advances, conduct, or comments; (2) that the
 22 harassment complained of was based on sex; and (3) that the harassment was “so
 23 severe or pervasive” as to “alter the conditions of the victim’s employment and
 24 create an abusive working environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477
 25 U.S. 57, 67 (1986). (As also noted by Defendants, California courts have adopted
 26 federal case law for hostile work environment sexual harassment claims under
 27 California law. *See Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.App.3d 590,
 28 608 (1989)). Furthermore, the existence of a hostile work environment depends on

1 the “totality of the circumstances.” *See Miller v. Dept. of Corrections*, 36 Cal.4th
2 446, 462 (2005).

3 Notably, courts have required that for an isolated act of harassment to
4 impose liability, it must be severe. *See Hughes v. Pair*, 46 Cal.4th 1035, 1043
5 (2009). However, such acts need not necessarily involve violence. Despite
6 Defendants’ contention that “[i]solated incidents, to be unlawful, generally must
7 include either physical violence or the threat thereof,” this argument is unsupported
8 by the available precedent. In support, Defendants cite to *Ellison v. Brady*, which
9 suggested that a forcible rape may suffice as an isolated incident. *Ellison v. Brady*,
10 924 F.2d 872, 877-878 (9th Cir. 1991). Defendants also cite to a matter in which a
11 corrections officer shook a fellow officer and used profane language to make a
12 point. *See Department of Corrections v. State Personnel Bd.*, 59 Cal.App.4th 131
13 (1997). However, neither of these cases support Defendants’ contention that such
14 an isolated incident *must* include physical violence or threats; rather, they simply
15 suggest examples of such extreme events that may qualify (indeed, in *Ellison*,
16 despite holding that the plaintiff established the requisite *prima facie* case, the
17 court noted that “[the harasser’s] conduct falls somewhere between forcible rape
18 and the mere utterance of an epithet.”) *See Ellison*, 924 F.2d at 877.

19 Additionally, courts have noted that the evidence in a hostile work
20 environment case “should not be viewed too narrowly: “The objective severity of
21 harassment should be judged from the perspective of a reasonable person in the
22 plaintiff’s position, considering ‘all of the circumstances.’” *See Lyle v. Warner*
23 *Brothers Television Productions*, 38 Cal.4th 264, 283 (2006) (citing *Oncale v.*
24 *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998)).

25 Here, it does not appear that Defendants challenge the first and second
26 elements of Plaintiff’s *prima facie* case under *Meritor*; rather, their argument
27 focuses on whether Defendant Love’s sending of the video depicting his receipt of
28 oral sex can be considered sufficiently severe or pervasive harassment. To this

1 end, Defendants cite to *Lyle*, arguing that the use of sexually course and vulgar
2 language in the workplace is not actionable *per se*. However, Defendants’
3 argument is misplaced. Plaintiff’s harassment at Defendant Love’s hands did not
4 stem from Love’s use of vulgar or offensive language that offended her.

5 First of all, the fact that Plaintiff was aware that Defendant Love used vulgar
6 language in his act is wholly inconsequential to this matter. Plaintiff’s harassment
7 does not stem from Love using impolite words, nor has she ever alleged so. Here,
8 Plaintiff has alleged that while she agreed to work on Love’s parody film, she
9 understood that there would not *be* any “actual porn” or sexual intercourse
10 involved. SMF 59, 60. Based on her interactions with Love, Plaintiff understood
11 that they would not actually be shooting porn. SMF 61. Furthermore, Plaintiff
12 believed that she would be involved in setting up actual test scenes and/or casting
13 for the parody, which she had not done so when she received the video in question.
14 SMF 65, 66. Accordingly, when Defendant Love abruptly sent Luke a video of
15 him receiving oral sex, it was wholly unexpected, shocking, disturbing, and
16 blatantly traumatizing to Plaintiff. Defendant Love’s actions went far and beyond
17 anything that could be considered part of the “parody” that Luke was working on,
18 and instead constituted a severely harassing and traumatic incident for Luke.
19 Indeed, Luke was so traumatized that she felt that she had no other choice but to
20 immediately end her employment with Love.

21 Furthermore, the fact that Luke did not believe that Love was interested
22 “romantically or sexually” in her is wholly irrelevant to this matter. There is no
23 requirement whatsoever that such romantic interest or sexual desire be contained in
24 an incident of sexual harassment; accordingly, this simply has no bearing on
25 whether Defendant Love harassed Ms. Luke by sending her a graphic sexual video.

26 Simply put, the matter at bar is quite unlike the facts and circumstances
27 existing in *Lyle v. Warner Bros. Television Productions*. Here, the video sent to
28 Luke was quite clearly surprising and unreasonable, given that Luke was expected

1 to be involved in the casting of and creating of test scenes for the project. For
2 Defendant Love to suddenly send a graphic sexual video without forewarning or
3 discussion beforehand went far beyond any reasonable requirements of Ms. Luke's
4 job related to Love's parody project, and a reasonable person in Ms. Luke's
5 situation would certainly feel harassed and disgusted. Furthermore, even assuming
6 *arguendo* that the other incidents of harassment cited by Ms. Luke in this matter
7 would not be sufficient on their own to establish a hostile work environment (i.e.
8 Love's comment about Luke's "ass look[ing] good in those jeans," Love's
9 comment about Ms. Luke needing her tuition paid, and Love's ogling of Ms.
10 Luke's body (SMF 70), they certainly serve to demonstrate Defendants' ongoing
11 culture of harassment and sexual predation that would cause any reasonable person
12 to feel traumatically harassed as a result of the ultimate receipt of the sexually
13 explicit video.

14 Accordingly, the fact remains that despite whether or not Ms. Luke was
15 working on a sexually-themed parody, the unwanted, graphic video of oral sex that
16 Defendant Love abruptly sent to her via text message constituted a sufficiently
17 severe instance of sexual harassment that would offend any reasonable person in
18 Ms. Luke's situation (and indeed highly offended and disturbed Ms. Luke upon her
19 receipt of such). While Defendants attempt to discount Ms. Luke's ability to be
20 sexually harassed by such due to the nature of the parody project, that nature
21 should be irrelevant as to whether Ms. Luke was the subject of unwanted sexual
22 harassment in the workplace that irrevocably altered her working conditions.
23 Accordingly, Ms. Luke has met her burden for her sexual harassment cause of
24 action.

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1 **V. CONCLUSION**

2 Accordingly, for the foregoing reasons, this Court should deny Defendants'
3 motion for summary judgment as to Plaintiff's valid claims for harassment against
4 Defendants Assembly Robot and Faizon Love.

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6 Dated: November 25, 2019 DEREK SMITH LAW GROUP, PLLC

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8 By: /s/ Nathaniel N. Peckham

9 Nathaniel N. Peckham

10 Attorneys for Plaintiff
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